

A CRITIQUE ON MUNICIPAL ANNEXATION IN OHIO

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In 1952, the Ohio State Law Journal published an article on municipal incorporation and annexation.¹ That article was introduced by the following statement:

This is primarily an expository paper. It is presented as one step in what the authors hope will be a thorough re-examination of the subject in Ohio leading to such statutory changes as may be required to articulate well-considered policy judgments. The Committee on Local Government Law of the Ohio State Bar Association is actively concerned with the subject. The members will perform a substantial public service if they will carry through the primary study and express their recommendations in a proposed statute.

That the time has come for this study will appear more clearly to the reader after he has considered the analysis of present law which follows. To the writers it is astounding that the governing legislation is so largely devoid of policy content, and that it has undergone so little modification over a long period marked by tremendous urban development. . . .

The author can do naught but reiterate that expression of feeling for although eight years and four sessions of the General Assembly of Ohio have intervened, nothing has been accomplished in the field of legislation to alleviate the situation. In fact the basic format of our annexation laws date back to 1869² and exist today with substantially the same provisions as were then enacted. While this article deals with the question of annexation only, it is necessary in such discussion to refer at least briefly to the statutes controlling incorporation of municipal corporations.³

The problem of annexation is not one peculiar to Ohio but exists in all states, in all areas in which there has been a rapid growth of urban population.

The need for attempting to solve the innumerable problems inherent in the gathering of population in communities and areas contiguous and adjacent to municipalities which have been or-

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¹ Fordham and Dwyer, "Municipal Incorporation and Territorial Changes in Ohio," 13 Ohio St. L.J. 503 (1952).

² 66 Ohio Laws 266.

³ Ohio Rev. Code § 709.03, provides that the Board of County Commissioners shall, insofar as applicable in an annexation proceeding, follow the procedures set forth in chapter 707, Revised Code, for incorporation proceedings. *Shugars v. Williams*, 50 Ohio St. 297, 34 N.E. 248 (1893).

ganized to provide for the essential over-all needs of urban living, has long had the attention of the Institute . . .

We have suggested review of annexation laws in the states for the purpose of advocating changes therein that will promote and provide the legal machinery for making annexation the effective device that it can be in solving these problems. . .⁴

Recently several bills have been presented to the General Assembly to revamp the annexation laws of Ohio but unfortunately none have passed. In the only area in which substantial changes have been made, the effect of municipal annexation on the school districts affected, the changes have only served to compound the problems.⁵ That is not to say, however, that the law has remained static in the field of annexation. There has been much litigation over, and judicial interpretation of, the annexation laws of Ohio. A substantial portion of that litigation has arisen over the annexation program of the City of Columbus. This program has resulted in 108 separate annexations to the City of Columbus since 1952 adding nearly fifty square miles of territory to that City and increasing its area from approximately 41 square miles in 1952 to approximately 90 square miles today.⁶ That a myriad of problems would result from such rapid growth is readily apparent but that is not the purpose of this article. Rather, the purpose is to deal with the problems of achieving this growth. It has been indeed time consuming and expensive to be forced to resort to 108 separate proceedings to achieve this growth and to be engaged in the court cases which resulted from many of these proceedings.

There are four separate methods provided by law for the annexation of territory to a municipal corporation: (1) annexation of incorporated territory on petition of the resident freeholders;⁷ (2) annexation of unincorporated territory on application of the municipal corporation;⁸ (3) annexation of one municipal corporation to another;⁹ and (4) annexation of a village to a city.¹⁰ It might be well to com-

⁴ Report of Committee on Annexation, 1957 Nat'l Munic. Rev. 153, 158.

⁵ Ohio Rev. Code § 3311.06. This problem is discussed in more detail in the subsequent portions of this article.

⁶ These figures were compiled from records of the City of Columbus. Actually, the program did not commence until 1954, so that all but two of the 108 annexations have been completed since January 1, 1954.

⁷ Ohio Rev. Code §§ 709.02 to 709.12, inclusive.

⁸ Ohio Rev. Code §§ 709.13 to 709.21, inclusive.

⁹ Ohio Rev. Code §§ 709.22 to 709.34, inclusive.

¹⁰ Ohio Rev. Code §§ 709.35 and 709.36. Ohio Rev. Code § 709.37 provides for a method of adjustment of boundaries between two adjoining municipal corporations but will not be discussed in this article. Basically, it provides that the municipal corporations may by ordinance agree to a change of boundaries so long as not more than five voters inhabit the territory affected.

ment at this point that annexation does not constitute a part of the power of local self government granted to municipal corporations by section 3, article XVIII, Ohio Constitution, but, rather, is a subject controlled entirely by general laws enacted by the General Assembly.¹¹

ANNEXATION ON REQUEST OF RESIDENT FREEHOLDERS

By far the most often used method of annexation is that achieved by proceedings commenced by petition of adult resident freeholders of the territory sought to be annexed pursuant to Revised Code section 709.03. Such petition must be signed by a majority of the adult resident freeholders of the territory, shall contain the name of a person authorized to act as agent of the petitioners and a full description of the territory sought to be annexed, and shall be accompanied by an accurate map or plat of such territory.¹² Such petition must be presented to the board of county commissioners of the county in which the territory sought to be annexed is located.¹³ The statute further provides that "the same proceedings shall be had as far as applicable, and the same duties in respect thereto shall be performed by the board and other officers as are required in case of an application to be organized into a village under sections 707.01 to 707.03, inclusive of the Revised Code."¹⁴

The territory sought to be annexed must be adjacent to the municipal corporation to which annexation is sought, but it is not necessary that the signers of the petition own property adjacent to the municipal corporation, it being sufficient if their property joined with other property constitutes the territory adjacent.¹⁵ But the signers of the petition must all be "adult resident freeholders" of the territory sought to be annexed.

Just what the words "adult resident freeholder" mean would at first blush seem fairly simple to determine. Obviously, corporations, partnerships, and other types of such entities are excluded for they have no capacity to be "adult" even if they could be "resident free-

¹¹ See section 6, article XIII, and section 2, article XVIII, Ohio Constitution. *Beachwood v. Bd. of Elections*, 167 Ohio St. 369, 148 N.E.2d 921 (1958). While this case dealt with detachment of territory from a municipal corporation, it would seem that its reasoning would apply with equal logic to annexation of territory to a municipal corporation. See also: *Chadwell v. Cain*, 169 Ohio St. 425, 431, 160 N.E.2d 239 (1959), which quotes authority to this effect; and *Schultz v. City of Upper Arlington*, 88 Ohio App. 281, 97 N.E.2d 218 (1950) which reached this conclusion with respect to annexation.

¹² Ohio Rev. Code § 709.02.

¹³ Ohio Rev. Code § 709.03.

¹⁴ *Ibid.*

¹⁵ *Branson v. Cain*, 76 Ohio L. Abs. 21, 146 N.E.2d 892 (C.P. 1956).

holders."¹⁶ This means that a great many of the persons affected by an annexation have no voice—no power—no right—in commencing a proceeding for annexation even though they may be the ones who have the most to gain, or to lose, as a result of annexation. The person who resides in the area but does not own property is excluded as is the person who owns property but does not reside in the area. Just as these persons are excluded from signing a petition for annexation, they are likewise precluded from being counted as a part of the majority required. Thus, annexation can be effectively blocked by a very small percentage of the owners or of the persons residing in the territory involved. In fact, it is conceivable that the owners of one parcel holding title in common and residing in the territory could block annexation of a large area without the other owners (not residents) and other residents (not owners) having any voice in the matter. It is less likely that under such circumstances annexation could be effected by such a minority inasmuch as the other owners and residents would be entitled to be heard at the hearing upon the annexation petition before the board of county commissioners and might have a right to secure an injunction to prevent annexation pursuant to Revised Code section 709.07.¹⁷ As stated by Judge Harter in the case of *Murdock v. Lauderbaugh*:¹⁸

From an *equitable* standpoint, it should be obvious that *all* property owners (whether individuals or corporations) should have a voice in the annexation of their property into a municipality. Such an argument should appeal to the legislature. However, we are dealing with the statutes *as they are*, not as they probably should be. The power to change the fundamental law in this field rests with the legislature, not with the courts.

No matter whether a proponent or opponent of annexation, one is faced by an almost insurmountable problem when it comes to the question of whether or not a majority of the adult freeholders residing in the territory sought to be annexed have signed the petition for annexation. There are many questions that immediately come to mind. Among these are the problem of proving the number of freeholders in

¹⁶ *Murdock v. Lauderbaugh*, 52 Ohio Op. 135, 116 N.E.2d 815 (C.P. 1953) *Contra*: 1950 Op. Att'y Gen. Ohio 283, *overruled*, 1956 Op. Att'y Gen. Ohio 97. Cf. 1946 Op. Att'y Gen. Ohio 795 and 1951 Op. Att'y Gen. Ohio 547. In the *Murdock* case, the court commented at page 136: "The word in Section 3548, Ohio General Code, which points up the applicability of the rules of statutory construction is 'adult.' That word cannot, in the very nature of the situation, apply to a corporation. To adopt the contention advanced by the defendants would be to ignore the word 'adult'—to give it no effect. . . ."

¹⁷ This is discussed in a subsequent portion of this article in the course of the discussion of court proceedings attacking annexation.

¹⁸ 52 Ohio Op. 135, 136, 116 N.E.2d 815, 816 (C.P. 1953).

the area, the question of what is the best evidence of who is and who is not a freeholder, the question of what is meant by the word "freeholder,"¹⁹ the problem of proving which of the freeholders are and which are not residents of the territory, the problem of proving which of the freeholders are and which are not adults, and many others.²⁰ These questions are most important because the petition must be signed by a majority of the adult resident freeholders in order that the board of county commissioners have jurisdiction to act.²¹ To attempt to obtain proof of these factors obviously would be quite time consuming and expensive, depending, of course, upon how large an area and how many persons are involved. It can also be quite frustrating as is shown by the following comment from an unreported opinion:²²

If the plaintiff is to be allowed to challenge the board's finding, the burden of so doing is upon the plaintiff. The plaintiff undertook a check of the county auditor's maps and the deeds recorded in this county, spending six days in so doing, with the help of an attorney. While there was general testimony from the plaintiff that, based upon his investigation, it was his "opinion" that some of the persons whose names appeared on the petition for annexation "were not freeholders," plaintiff was forced to admit on further questioning that his investigation was to determine whether the signers had "an interest" in real estate at the locations involved and he did not purport to define "freeholder." Even if this relatively unsatisfactory evidence were used and given full credence, there was still no direct evidence from plaintiff, or anyone else, as

¹⁹ See 17A Words and Phrases 308, which lists many varying definitions of the word "freeholder." In the present usage, however, it would seem that the word was used in the sense of an owner of a fee interest in property, and the word has usually been assumed to have that meaning in judicial proceedings. A serious question might be raised, however, over the status of a life tenant and possibly owners of other interests in real property.

²⁰ The Board of County Commissioners of Franklin County, Ohio, have adopted Rules of Evidence for Proceedings for Annexation of Territory by Freeholders' Petition (1954). These provide for such proof by requiring the petitioners to furnish (1) an affidavit of the agent setting forth the number of resident adult freeholders in the area; (2) a list of all freeholders in alphabetical order in the area sought to be annexed as of the date of filing the petition which list must be approved by the County Auditor's Office; and (3) An affidavit of the persons circulating the petition as to the residence of all persons who signed the petition. Obviously, a serious problem arises if the opponents of annexation controvert, by affidavit or otherwise, the proof furnished by the petitioners.

²¹ Hicks v. Cain, 78 Ohio L. Abs. 566, 154 N.E.2d 199 (C.P. 1957).

²² From an unreported opinion in the case of McCoy v. Cain, C.P., Franklin County, No. 198474 (December 27, 1958). It has been held, moreover, that the courthouse records, and not testimony of a witness even if an "expert," is the best evidence of the number of freeholders. Lamneck v. Cain, 154 N.E.2d 99 (Ohio C.P. 1955), *appeal dismissed*, 73 Ohio L. Abs. 20, 136 N.E.2d 330 (Ct. App. 1955).

to just how many "adult freeholders" actually resided upon the territory to be annexed. We might eliminate a few patently improper signatures from the petition but, should we do so, we would still not have any "total" on this record as to which we could apply the "majority" signature test. It is tragic that plaintiff's long and detailed work did not result in competent testimony upon this ultimate fact; without this significant number, however, we feel compelled to follow the finding of the board of county commissioners.

Perhaps, this problem of proof of the number and who were adult resident freeholders seemed easy to the General Assembly in 1869 when this provision was placed in the law,²³ but it is far from simple when we deal with today's urban communities.

As stated above, the petition for annexation must be presented to the board of county commissioners at a regular session thereof.²⁴ It is sufficient, however, that the petition be placed in the custody of the board for the purpose of having that body take action thereon so that a reading and discussion of the petition at an adjourned regular meeting constitutes a "presentation."²⁵ When the petition is so presented it is the duty of the board of county commissioners to (1) cause the petition to be filed in the office of the county auditor; (2) fix the time and place for hearing of the petition, which shall be not less than sixty days after filing; and (3) notify the agent of the petitioners of the time and place of such hearing.²⁶ Thereupon the agent of the petitioners must cause a notice containing the substance of the petition and the time and place where it will be heard to be advertised for six consecutive weeks in a newspaper of general circulation in the county and to be posted in a conspicuous place within the territory sought to be annexed.²⁷

The hearing on the petition for annexation "shall be public, and may be adjourned from time to time, and from place to place, according to the discretion of the board of county commissioners."²⁸ At such hearing, "any person interested may appear, in person or by attorney, and contest the granting of the prayer of the petition."²⁹ Affidavits may be submitted in support of or in opposition to the prayer of the petition and must be considered by the board.³⁰ The

²³ See note 2, *supra*.

²⁴ Ohio Rev. Code § 709.03.

²⁵ *Baumhardt v. Mitchell*, 107 Ohio App. 209, 157 N.E.2d 898 (1958).

²⁶ Ohio Rev. Code § 707.05.

²⁷ Ohio Rev. Code § 707.05. *Franklin v. Croll*, 31 Ohio St. 647 (1877).

²⁸ Ohio Rev. Code § 707.06. *Shugars v. Williams*, 50 Ohio St. 297, 34 N.E. 248 (1893).

²⁹ *Ibid.*

³⁰ *Ibid.*

board shall approve the annexation only if it finds that: (1) the petition contains all the matters required; (2) the statements in the petition are true; (3) the territory is accurately described and is not unreasonably large or small; (4) the map or plat is accurate; (5) the persons whose names are subscribed to the petition are freeholders residing in the territory; (6) notice has been given as required; and (7) it is right that annexation be allowed.³¹

If any of these factors does not exist, annexation should be disapproved,³² although the board of county commissioners may permit the petition to be amended³³ which presumably would include an amendment to correct an inaccurate description³⁴ or map. Minor technical errors in the description or map or plat may be disregarded;³⁵ however, if a bona fide dispute may arise concerning the location of boundaries, the description or map does not have the degree of accuracy required by the statute.³⁶ This, however, is an evidentiary question,³⁷ as undoubtedly are most of the other matters to be determined by the board of county commissioners.

The board of county commissioners acquires its jurisdiction upon the filing of the petition for annexation. Of course, if the petition does not contain the signatures of a majority of the adult resident freeholders of the territory sought to be annexed, the board would have no jurisdiction to approve the annexation. This raises another important problem which has recently been resolved by the Supreme Court of Ohio. This is the problem of withdrawals and additions of signatures to the petition. There had previously been conflicting decisions as to whether and under what circumstances a signator of an annexation petition could change his mind and withdraw his name from the petition.³⁸ The law is now settled that the petitioners do

³¹ Ohio Rev. Code § 707.07.

³² *Hoye v. Schaefer*, 77 Ohio L. Abs. 170, 148 N.E.2d 532 (C.P. 1957), *aff'd* 109 Ohio App. 489, 157 N.E.2d 140 (1959).

³³ Ohio Rev. Code § 707.06; 1949 Op. Att'y Gen. Ohio No. 745.

³⁴ *Pollack v. Toland*, 1 Ohio C.C.R. (ns) 315 (Ct. App. 1903).

³⁵ *Turpin v. Hagerty*, 12 Ohio Dec. 161 (C.P. 1901), *aff'd without opinion*, 69 Ohio St. 534 (1901); *Schorr v. Braun*, 4 Ohio N.P. (ns) 561 (C.P. 1906).

³⁶ *Hoye v. Schaefer*, 77 Ohio L. Abs. 170, 148 N.E.2d 532 (C.P. 1957), *aff'd*, 109 Ohio App. 489, 157 N.E.2d 140 (1959).

³⁷ *Chadwell v. Cain*, 169 Ohio St. 425, 429, 160 N.E.2d 239 (1959).

³⁸ In *Lakeville v. Palmer*, 74 Ohio L. Abs. 45, 136 N.E.2d 171 (C.P. 1955), it was held that a signator of the petition had the right to withdraw his name therefrom any time prior to *final* action on the petition by the Board of County Commissioners and if a sufficient number so withdrew so that the remaining signators constituted less than the requisite majority, the board lost its jurisdiction to act upon the petition. In *Lamneck v. Cain*, 154 N.E.2d 99 (Ohio C.P. 1955), *appeal dismissed*, 136 N.E.2d 330, however, another court apparently held that no withdrawal after the petition was filed could affect the jurisdiction of the board to act on the petition. A similar conclusion was

have a right to withdraw their names from the petition any time prior to the first *official* action taken thereon by the board of county commissioners.³⁹ Such official action has been taken when the board by resolution orders the petition filed with the county auditor and fixes the time and place of the hearing upon the petition pursuant to Revised Code section 707.05.⁴⁰ Thereafter, withdrawals of signatures from the petition is a matter within the discretionary power of the board of county commissioners⁴¹ and presumably relate only to the question of whether it is right that annexation be permitted, not to the question of jurisdiction.

Once the board of county commissioners has held its hearing and considered the evidence presented, it must make a decision either to approve or disapprove the annexation and the making of such decision may be compelled by mandamus.⁴² If the order of the board is one allowing or approving annexation, the board shall forthwith deposit the final transcript of the hearing together with the petition and the accompanying map or plat with the clerk (or auditor) of the municipal corporation, who shall file the same in his office.⁴³ The clerk (or auditor) of the municipal corporation shall hold the transcript and other papers for a period of sixty days and then shall present the same to the legislative authority of the municipal corporation at its next regular session after the expiration of such sixty-day period.⁴⁴ The legislative authority shall then either reject or accept the annexation.⁴⁵ It is not necessary that the legislative authority act immediately, and it has been held that a delay of two years and eight months does not defeat the power of the legislative authority to accept the annexation.⁴⁶

reached in *Roush v. Barthallow*, 105 N.E.2d 85 (C.P. 1950), *aff'd*, 104 N.E.2d 697, *appeal dismissed*, 156 Ohio St. 452, 103 N.E.2d 273, where the withdrawal was attempted after the final hearing was held by the board but before its decision was formalized. In an earlier case, *Pickelheimer v. Urner*, 29 Ohio NP (ns) 547 (C.P. 1932), *aff'd*, 45 Ohio App. 343, 187 N.E.2d 123, the court expressed the opinion that the petition was in the nature of an offer to the municipal corporation and that such offer could be withdrawn by the petitioners any time prior to acceptance of annexation by the municipal corporation.

³⁹ *Chadwell v. Cain*, 169 Ohio St. 425, 160 N.E.2d 239 (1959); *Hicks v. Cain*, 78 Ohio L. Abs. 566, 154 N.E.2d 199 (C.P. 1957).

⁴⁰ *Ibid.*

⁴¹ *Ibid.* It would appear from the *Chadwell* case, that not only may withdrawals be made, but also that additions may be made to the petition, for the third paragraph of the syllabus refers to both the withdrawal and the addition of signatures as lying within the discretionary power of the board after official action is taken on the petition.

⁴² *State ex rel. Loofbourrow v. Bd. of County Comm'rs of Franklin County*, 99 Ohio App. 169, 132 N.E.2d 259 (1955).

⁴³ Ohio Rev. Code § 709.03.

⁴⁴ Ohio Rev. Code § 709.04.

⁴⁵ Ohio Rev. Code § 709.04.

⁴⁶ *Decker v. City of Toledo*, 56 Ohio App. 344, 10 N.E.2d 955 (1937).

While it must be conceded that although Revised Code section 709.04 provides that the clerk shall present the transcript to the legislative authority and "*thereupon* the legislative authority, by resolution or ordinance, shall accept or reject the application for annexation," the legislative authority is not compelled to act immediately but should be allowed a reasonable time to consider the matter, there must be a limit to how long a delay would be permissible. Two years and eight months would seem to stretch the range of reasonableness to the breaking point. Unfortunately, there is no statutory provision setting forth a limit upon how long the legislative authority may delay in considering the application for annexation. The need for such limitation is, however, quite apparent. Not only may conditions in the area involved change considerably after the elapse of a long period of time, but the petitioners should be entitled to an answer from the legislative authority so that they may have the opportunity, if they so desire, to incorporate or to annex to another municipal corporation, if the first does not want them.

This leads us to another problem—that of the power of the board of county commissioners to reconsider their decision approving the annexation. It would appear that this question was adequately answered by the Supreme Court of Ohio in *State ex rel. Maxson v. Bd. of County Comm'rs of Franklin County*,⁴⁷ where it stated in a *per curiam* opinion:

In the instant case, the board had the statutory power and duty to determine, in the exercise of its sound discretion, whether annexation to Grandview Heights should be granted and had continuing jurisdiction to reconsider its decision until the institution of court proceedings attacking such decision or until the expiration of the time allowed for the institution of such proceedings (Section 709.04, Revised Code).

From this decision it would appear that the board does have power to reconsider a decision approving annexation but that that power ceases upon the elapse of the sixty-day period prescribed by Revised Code section 709.04 that the clerk must hold the transcript, or sooner if an action is instituted attacking the board's decision pursuant to Revised Code section 709.07.⁴⁸

That decision, however, has not settled the question. In an unreported opinion of the Tenth District Court of Appeals,⁴⁹ it was held that the board had jurisdiction to reconsider its decision approving annexation over two years later where the legislative authority had

⁴⁷ 167 Ohio St. 458, 460, 149 N.E.2d 918, 920 (1958).

⁴⁸ The aspects of judicial review are discussed, *infra*.

⁴⁹ *Mariemont, Inc. v. Schaefer*, Case No. 6199 (December 29, 1959), reversing the Court of Common Pleas of Franklin County, Case No. 203399 (February 26, 1959).

not accepted the annexation in the meantime despite the fact that court proceedings were instituted attacking the board's prior decision and that such proceedings were pending (including a temporary restraining order enjoining the clerk from presenting the transcript to the legislative authority) until two days before the board's new decision disapproving the annexation, and such court proceedings were voluntarily dismissed by the opponents of annexation.⁵⁰

The Court of Appeals⁵¹ commented as follows in its as yet unreported opinion:⁵²

However, we are in accord with the above quoted pronouncement of the Supreme Court in the *Maxson* case, if it is intended to embrace the comprehensive meaning that the continuing jurisdiction of the Board of County Commissioners is thereby⁵³ arrested, interrupted and held in abeyance pending the final decision in the court proceedings and, in the event such court proceedings are dismissed, the continuing jurisdiction of the Board resumes with authority to rehear, reconsider and revoke its previous decision.

This case is now pending in the Supreme Court of Ohio on a motion to certify⁵⁴ and it may well be that the question will be settled by that court in the near future.

It would appear, moreover, that the same principle with respect to reconsidering a decision approving annexation should govern with respect to reconsidering a decision disapproving annexation. Thus, the board would possess power to reconsider its rejection of annexation. This question, however, has not been judicially resolved.

If the legislative authority of the municipal corporation rejects the application for annexation, the statute is quite clear that this ends the matter. Revised Code section 709.05, provides as follows in this regard:

If the resolution or ordinance required by section 709.04 of the Revised Code is a rejection of the application for annexation, no further proceedings shall be had. Such rejection shall not be a

⁵⁰ The City Council proceeded to accept the annexation at its next regular meeting after dismissal of the prior case and dissolution of the temporary restraining order even though in the interim the board of county commissioners had "reconsidered" and "disapproved" the annexation. The case was commenced to enjoin the county recorder from recording the copy of the completed transcript of annexation and accompanying papers filed with him pursuant to Ohio Rev. Code § 709.06.

⁵¹ Court of Appeals of the Tenth Judicial District with judges of other districts sitting by designation.

⁵² See note 49, *supra*.

⁵³ By "thereby" it is assumed that the court meant the institution of court proceedings attacking the decision of the board of county commissioners approving the annexation.

⁵⁴ Case No. 36567.

bar to application thereafter to the board of county commissioners on the same subject.⁵⁵

It has been indicated, however, that merely failing to pass an ordinance providing for the acceptance of the annexation may not constitute a rejection of the annexation within the meaning of the statute but that the rejection must be by ordinance affirmatively providing that the annexation is rejected. In *Decker v. City of Toledo*,⁵⁶ the court in speaking of Revised Code section 709.05, stated:

This case does not quite fit the exact language of this section. The ordinance in question was one to approve the application to annex, not to *reject* it. What happened was that the approval ordinance failed of passage for lack of a two-thirds majority.

While this case has been criticized upon this point,⁵⁷ it would appear that the reasoning of the court upon the particular facts involved was probably correct. The ordinance of approval was an emergency ordinance requiring, as indicated by the court, a two-thirds vote. Thus, that ordinance could quite conceivably have received a majority vote of council but failed of passage because it received less than the two-thirds vote needed to pass emergency ordinances.⁵⁸ The case does not indicate the number of votes the ordinance received but the statement of the court that it failed to receive a two-thirds vote leaves open the possibility that it did receive a majority vote. Under such circumstances quite clearly it would not be possible to state that by reason of the failure of the emergency ordinance to pass the council had *rejected* the annexation. On the other hand, if an ordinance providing for acceptance of the annexation fails to receive a majority vote of council an entirely different picture is presented and the *Decker* case would constitute no clear authority for the proposition that the council had not rejected the annexation. If such circumstances could be clearly established it might be argued that the annexation had been rejected and no further proceedings could be had no matter what the form of the ordinance, affirmative or negative. However, the question is surely debatable inasmuch as the converse would most assuredly not be true, that is, if an ordinance providing

⁵⁵ The "further proceeding" which shall not be had if the application for annexation is rejected consists of the clerk (or auditor) making two copies of the transcript of the proceedings and accompanying papers and delivering one to the secretary of state and one to the county recorder pursuant to Ohio Rev. Code § 709.06. In addition, the clerk is required by Ohio Rev. Code § 709.011 to notify the county board of elections if such annexation is approved.

⁵⁶ See note 46, *supra*.

⁵⁷ Fordham and Dwyer, "Municipal Incorporation and Territorial Changes in Ohio," 13 Ohio St. L.J. 503, 521 (1952).

⁵⁸ See Ohio Rev. Code §§ 731.17 and 731.30.

for rejection of annexation failed of passage, it could hardly be said that the annexation had been accepted. Furthermore, it might well be that one or more members of council were not opposed to the annexation but for some reason did not want to accept it at that time or wished further time to study the matter and thus would vote against both an ordinance to accept the annexation and an ordinance to reject the annexation. It would seem, therefore, that something more definite than the mere failure of passage of an ordinance providing for the acceptance of annexation should be required in order to constitute a rejection of the annexation.⁵⁹

Upon acceptance of the annexation by the legislative authority of the municipal corporation, the territory involved becomes a part of the municipal corporation. Revised Code section 709.10 provides in this regard as follows:

When the resolution or ordinance accepting annexation of adjacent territory has been adopted by the legislative authority of a municipal corporation, such territory is deemed a part of the municipal corporation, and the inhabitants residing therein shall have all the rights and privileges of the inhabitants within the original limits of such municipal corporation.

Thus, the filing of the transcript and accompanying papers⁶⁰ are not a requisite to the effectiveness of the annexation.⁶¹ It has further been held that the annexation becomes effective upon *passage* of the ordinance notwithstanding a general requirement⁶² that there be a delay of thirty days before an ordinance takes effect.⁶³ Such ordinance is, however, subject to the referendum provisions.⁶⁴

After the annexation has been thus completed, there must be an apportionment by the county auditor of the funds and net indebtedness of the township losing the territory between the township and the

⁵⁹ See text above note 46, *supra*, in regard to the reasonableness of delay in acting upon the annexation.

⁶⁰ See note 55, *supra*.

⁶¹ *Roettker v. Cincinnati*, 56 Ohio App. 464, 11 N.E.2d 103 (1936); *Bach v. Goff*, 24 Ohio C.C.R. (ns) 561 (Ct. App. 1904), *aff'd without opinion*, 70 Ohio St. 508, 72 N.E. 1154 (1904); *State ex rel. South Brooklyn v. Craig*, 21 Ohio C.C.R. 13 (Ct. App. 1900); *Bd. of Educ. v. Bd. of Educ.*, 48 Ohio Op. 256, 108 N.E.2d 387 (C.P. 1952), *aff'd*, 48 Ohio Op. 264. The *Roettker* case states, however, that the annexation may be subsequently voided if the municipal corporation refuses to accept the apportionment of indebtedness and division of funds made by the county auditor pursuant to Ohio Rev. Code § 709.12.

⁶² Ohio Rev. Code § 731.29.

⁶³ *Bd. of Educ. v. Bd. of Educ.*, 48 Ohio Op. 256, 108 N.E.2d 387 (C.P. 1952), *aff'd*, 48 Ohio Op. 264; 1955 Op. Att'y Gen. Ohio 211.

⁶⁴ *Ibid.* The *Bd. of Educ.* case held that the ordinance was still subject to referendum if petitions be filed within thirty days after passage so that annexation could be voided in this manner if the ordinance lost the referendum.

municipal corporation if the territory will not be subject to the township tax levies thereafter. The apportionment shall be based upon the proportion of the tax duplicate of the transferred territory to the tax duplicate of the remaining portion of the township.⁶⁵

JUDICIAL REVIEW

Judicial review of annexation proceedings commenced by petition of adult resident freeholders is provided by Revised Code section 709.07, which provides:

If, within sixty days from the filing of the transcript, map or plat, and petition in his office as required by section 709.03 of the Revised Code, the auditor or clerk of the annexing municipal corporation receives notice from any person interested that such person has presented a petition to the court of common pleas to enjoin further proceedings, such auditor or clerk shall not report to the legislative authority such transcript, map or plat, and petition, until after the final hearing and disposition of such petition.

The statute, it will be noted, is somewhat vague as to the exact procedure to be followed in such judicial review. It has usually been assumed, however, that once again reference must be made to the incorporation statutes to determine the procedure to be followed in such judicial review,⁶⁶ and it would appear that this was the legislative intent.

There are several unusual procedures necessary to commence such judicial proceedings which can well cause the unwary to be out of court as soon as he starts although he has followed the usual procedures for commencing an action. The applicable provision provides that "any person interested may make application by petition to the court of common pleas, or, if during vacation, to a judge thereof . . ."⁶⁷ who shall "cause the petition . . . to be filed and docketed in the office of the clerk of the court of common pleas."⁶⁸ It has been held that this requirement must be followed literally in order to confer jurisdiction upon the court and that merely filing the petition with the clerk in the ordinary manner without first presenting it to the court is not sufficient compliance.⁶⁹ In fact, on several occasions, petitions filed with the clerk but not first presented to the court have been ordered

⁶⁵ Ohio Rev. Code § 709.12. See Fordham and Dwyer, *supra*, note 57, at 525-526, for a discussion of this apportionment.

⁶⁶ *Hacker v. Payne*, 7 Ohio App. 25 (1916); *McClintock v. Cain*, 74 Ohio L. Abs. 554, 142 N.E.2d 296 (C.P. 1956).

⁶⁷ Ohio Rev. Code § 707.11.

⁶⁸ Ohio Rev. Code § 707.13.

⁶⁹ *Craft v. Schaefer*, 34 Ohio L. Abs. 548, 38 N.E.2d 434 (Ct. App. 1941); *Hacker v. Payne*, 7 Ohio App. 25 (1916).

stricken from the files upon motion.⁷⁰ It is not necessary, however, that the court act formally by journal entry ordering the petition filed in order to comply with this requirement, it being sufficient if the court orally or informally order the petition filed inasmuch as it is performing an administrative rather than a judicial function.⁷¹

Another pitfall to be avoided is merely filing a precipe and having summons issued and service obtained in the usual manner. While this might be sufficient, it will be noted that the statute requires that the clerk (or auditor) receive *notice* from a "person interested" that such person has presented a petition to the court of common pleas seeking to enjoin further proceedings for annexation.⁷² There is some question as to whether service of summons, even with a copy of the petition, is sufficient notice to comply with this section so that the more prudent course is to serve a separate notice of filing of the petition upon the clerk (or auditor).

There is an additional notice requirement that the person filing the petition "shall give notice thereof, in writing, to the . . . agent of the petitioners" in connection with incorporation proceedings.⁷³ In an unreported opinion it has been held, however, that this requirement does not apply to annexation proceedings, the court stating:⁷⁴

Admittedly, there was no written, or other notice to the "agent of the petitioners" of the filing of the petition by the plaintiff in this matter. There is no case law upon this immediate question. It seems never to have been raised in Ohio before, and this court, therefore, has the duty of "pioneering" on this point. Accepting this responsibility, it is my conclusion that for an "annexation" (as contrasted with an "incorporation") problem, Section 709.07, Revised Code of Ohio, governs on the method of giving notice of the filing of a petition of the kind here involved

The notice to the clerk of the city of Columbus contemplated by statute was given in this case. Since this statute does not even hint at any requirement that, in addition to such notice to the clerk, there should be notice to the "agent of the petitioners" (as required in the "incorporation" chapter, *i.e.* in Section 707.12, Revised Code) we hold such notice to the "agent of the petitioners" is not a prerequisite to our court's obtaining jurisdiction of this matter.

While Revised Code section 709.07 by its terms states that the clerk shall not present the transcript, map or plat, and petition to the legislative authority if he is notified of the filing of a petition to

⁷⁰ *Ibid.*

⁷¹ *Eagle v. Schaefer*, 160 Ohio St. 302, 116 N.E.2d 442 (1953).

⁷² Ohio Rev. Code § 709.07.

⁷³ Ohio Rev. Code § 707.12.

⁷⁴ *McCoy v. Cain*, Court of Common Pleas of Franklin County, Ohio, Case No. 198474 (December 27, 1958).

enjoin further proceedings, the usual, and better procedure has been for the plaintiff to seek immediately a temporary restraining order from the court. This is true, because if the defendant were to take the position that the plaintiff for some technical reason was not properly in court, the municipal corporation may well proceed to accept the annexation and thus end the matter if the technical defect did exist. In *Naumovich v. Cain*⁷⁵ this very thing happened and the court of appeals held that the case had been rendered moot by reason of completion of the annexation by such acceptance, stating:

The record reveals further that while the action for injunction was pending the territory involved was annexed to the City of Columbus, no temporary restraining order having been issued against the appellee.

Another very vexing problem has existed for some time with regard to who may bring such action to enjoin the annexation. It will be noted that the statute provides that the petition must be brought by a "person interested."⁷⁶ Just what is necessary to constitute a "person interested" has not been clearly resolved yet. It would appear, and has been so held,⁷⁷ that another adjacent municipal corporation which might also desire to annex the territory is not a "person interested" within the meaning of the statute inasmuch as the word "person" is defined to include only a *private* corporation.⁷⁸

It has been held that in order to qualify as a person interested "one's rights must be affected substantially, but not remotely, by the annexation itself."⁷⁹ Or to put it in other words: "In order for a plaintiff to maintain such type of action, he must not only show his interest in the action but how the alleged annexation adversely affects his legal rights."⁸⁰

Sufficient facts to show that the plaintiff qualifies as a person interested must be alleged in the petition. It has been held that a

⁷⁵ 76 Ohio L. Abs. 208, 146 N.E.2d 150 (Ct. App. 1950). In an unreported opinion in *Caito v. Cain*, Court of Common Pleas of Franklin County, Ohio, Case No. 191084 (January 18, 1955), it is stated, however, that "the clerk by operation of Section 709.07 R.C. was automatically stayed from presenting the petition to council until final hearing and disposition of the petition."

⁷⁶ Ohio Rev. Code § 709.07.

⁷⁷ *Cincinnati v. Rosi*, 92 Ohio App. 8, 109 N.E.2d 290 (1952); *Lockland v. Shaver*, 44 Ohio Ops. 189, 98 N.E.2d 643 (C.P. 1950). *Cf. Bd. of Educ. v. Bd. of Educ.*, 167 Ohio St. 543, 150 N.E.2d 37 (1958).

⁷⁸ Ohio Rev. Code § 701.01.

⁷⁹ *Markos v. Cain*, 78 Ohio L. Abs. 561, 154 N.E.2d 196 (C.P. 1955), *appeal dismissed*, 73 Ohio L. Abs. 20, 136 N.E.2d 330 (Ct. App. 1956); *Schurtz v. Cain*, 75 Ohio L. Abs. 132, 143 N.E.2d 496 (C.P. 1956).

⁸⁰ *Post v. Cain*, 154 N.E.2d 185 (Ohio C.P. 1956); *Branson v. Cain*, 76 Ohio L. Abs. 21, 146 N.E.2d 875 (C.P. 1956).

bare allegation that the plaintiff is an adult freeholder and resident of the township in which the territory sought to be annexed is located and is interested in and opposed to the annexation is insufficient and will be subject to demurrer, the words "is interested in" constituting a legal conclusion and not the allegation of an operative fact.⁸¹ It has likewise been held that an allegation that the plaintiff is the agent for incorporation of a proposed village which includes the territory sought to be annexed, without further allegation of fact, is insufficient to show that the plaintiff is a "person interested" so that a demurrer must be sustained as to a petition so alleging.⁸² The "interest" portion of this requirement has also been referred to as requiring that some legal right, title, or interest of a resident of the territory sought to be annexed or of the part of the township that would remain after such annexation would be adversely affected by the annexation itself.⁸³

This does not mean, however, that everyone is excluded from qualifying as a person interested entitled to maintain an action. It has been held that the words do not require a direct pecuniary interest in property within the limits of the proposed annexation and that a person living two miles distant therefrom is a person interested if by reason thereof his taxes will be materially increased.⁸⁴ More recently it was held in the case of *Hicks v. Cain*⁸⁵ that an adult resident freeholder of the territory sought to be annexed is, by virtue of that status alone, a person interested at least upon the question of whether the Board of County Commissioners had jurisdiction to consider the petition for annexation. The court reviewed and distinguished the prior cases as follows:

In *McCord v. Cain*, Ohio Com. Pl. 154 N.E.2d 188, *Van Arsdale v. Cain*, Ohio Com. Pl. 154 N.E.2d 219, *Post v. Cain*, Ohio Com. Pl. 154 N.E.2d 179, and *Watkins v. Cain*, Ohio Com. Pl. 154 N.E.2d 210, the plaintiffs were adult resident freeholders and the opinions of the Court in such cases do contain language to the effect that the plaintiffs had not established "any interest" to entitle them to the relief sought. In *McClintock v. Cain*, Ohio Com. Pl. 142 N.E.2d 296 two of the plaintiffs were adult resident freeholders and the rest non-residents. On the "interest" question, it will be noted that the Court separately treated the "interest" of the residents and the "interest" of the non-residents. From a detailed study of the opinions in all such cases, it would appear that the Court therein was discussing primarily the question of the "interest" of the plaintiffs as it might relate to the question as to whether the annexation was right, just, or equitable, and was

⁸¹ *Markos v. Cain*, *supra* note 79.

⁸² *Crandall v. Cain*, 146 N.E.2d 892 (Ohio C.P. 1955).

⁸³ *Lockland v. Shaver*, 44 Ohio Op. 189, 98 N.E.2d 643 (C.P. 1950).

⁸⁴ *Hall v. Siegrist*, 13 Ohio Dec. 46 (C.P. 1902).

⁸⁵ 78 Ohio L. Abs. 566, 154 N.E.2d 199 (C.P. 1957).

saying in effect that plaintiffs must show that such was not right, just, or equitable not simply in a general sense, but in the sense that it unjustly or inequitably affected his rights. In other words, plaintiff could not prevail by showing that the annexation would be unjust or inequitable as it might affect the rights of third persons, so long as his own rights were not unjustly or inequitably affected. . . .

In any event, none of such cases are clear cut holdings that an adult resident freeholder is not a "person interested" in the question of whether the Board of County Commissioners had *jurisdiction* to approve a petition for annexation, and if they were, we would have to respectfully disagree. . . .

By virtue of the provisions of Sec. 709.02 R.C. the Board is powerless to act except upon the filing with it of a petition "signed by a majority of the adult resident freeholders residing in such territory." Whether the General Assembly was wise in limiting the petition only to the option of adult resident freeholders, is of no concern to this court. This it did, however, apparently on the basis that only those who would be affected personally by virtue of being residents and also affected as to their real property by virtue of being freeholders, should have the right to initiate such annexation proceedings if they were also adults. We think it clearly follows, as a matter of legislative intent, that an adult resident freeholder in the area sought to be annexed, by virtue of such status alone, is a "person interested" in the question of whether a petition for annexation contains sufficient signatures of adult resident freeholders to bestow *jurisdiction* on the Board of County Commissioners to approve the same, and if such lack of jurisdiction be alleged and proved by such a freeholder, he would be entitled to an injunction enjoining further proceedings under the provisions of Section 709.07 *et seq.*, R. C.

More recently, it was held that the status of adult resident freeholder of the territory sought to be annexed is sufficient to constitute such person a person interested for the purpose of raising any proper issue in an action attacking the annexation proceedings.⁸⁶ In an unreported opinion, the *Hicks* case was relied upon and extended to reach the conclusion that a private corporation owning property in the territory sought to be annexed was by virtue of that fact alone a person interested, and therefore entitled to maintain an action attacking the decision of the Board of County Commissioners approving the annexation.⁸⁷

⁸⁶ *Hoye v. Schaefer*, 109 Ohio App. 489, 157 N.E.2d 140 (1959), *affirming*, 77 Ohio L. Abs. 170, 148 N.E.2d 532 (C.P. 1957). The court of appeals stated simply that: "We have not given consideration to the question whether the plaintiffs are 'interested parties' for the reason that it seems so obvious, from the uncontroverted evidence, that they are interested persons, that further consideration of the question is unnecessary."

⁸⁷ *Mariemont, Inc. v. Cain*, Court of Common Pleas of Franklin County, Case No. 196409 (July 24, 1958). The court stated: "In Case No. 196409 the plaintiff is Mariemont, Inc., and alleges it is an Ohio Corporation with its principal place of

While it may be that the earlier cases had almost made it impossible for anyone to qualify as a person interested, this case has gone almost to the opposite extreme. If all of the other cases are considered together we can see that there develops an orderly and just method for determining who is and who is not a person interested. Inasmuch as it is the adult resident freeholders of the area who are by statute vested with the power to initiate the annexation proceedings, it would seem to follow logically that those of that class (adult resident freeholders), who oppose annexation would by virtue of that status alone be persons interested within the contemplation of the statute. All other persons, on the other hand (including private corporations), should be required first to show the nature of their interest (how they would be affected), before they could qualify as persons interested. Of course, both other municipal corporations, the township involved, and any school district affected should be excluded completely from the category of person interested within the meaning of the statute.

The action, however, is not in any sense an appeal from decision of the Board of County Commissioners. Rather it is an independent injunction proceeding. The supreme court has commented as follows in the case of *Geauga Lake Improvement Assn. v. Lozier*.⁸⁸

. . . The function of the Court in this case is to try an issue formed by pleadings in an injunction suit, according to the rules of procedure in injunction suits, to hear evidence and to administer justice according to that evidence adduced at the trial.

Accordingly, the burden of proof in these proceedings rests upon the plaintiff and this must be by clear proof other than a mere preponderance of the evidence.⁸⁹ Furthermore, it has been held that the plaintiff must show that he has no adequate remedy at law.⁹⁰ However, it would appear that if plaintiff can maintain the other issues involved he would necessarily have no adequate remedy at law inasmuch as the injunction proceeding is the remedy expressly provided by statute. It has been stated, however, that:

business at Columbus, and owns real estate within the area proposed to be annexed. Section 701.01 R.C., Paragraph (A), reads: "Person" includes a private corporation.' We believe a private corporation, such as plaintiff in Case No. 196409, may be a 'person interested,' as contemplated by Section 709.07 R. C., even though it may not fall strictly within the category of a resident freeholder, or an adult resident freeholder. Said plaintiff qualifies as an 'interested party,' eligible to file Case No. 196409."

⁸⁸ 125 Ohio St. 565, 574, 182 N.E. 489 (1932).

⁸⁹ *McClintock v. Cain*, 74 Ohio L. Abs. 554, 142 N.E.2d 296 (C.P. 1956); *Schurtz v. Cain*, 75 Ohio L. Abs. 132, 143 N.E.2d 496 (C.P. 1955).

⁹⁰ *McCord v. Cain*, 154 N.E.2d 188 (Ohio C.P. 1956); *Van Arsdale v. Cain*, 154 N.E.2d 219 (Ohio C.P. 1956).

The relief by way of injunction, therefore, is dependent upon whether the plaintiffs have an adequate remedy at law or will suffer irreparable injury or in the words of the statute, they must show that the proposed annexation was not "right, just or equitable" which makes this an ordinary suit in equity, governed by the regular rules of equity.⁹¹

This seems to be somewhat of an oversimplification inasmuch as the Revised Code section 709.13 provides that:

If no error is found in the proceedings before the board of County Commissioners, and no inaccuracy in the boundaries, . . . and if the court further finds that the limits of the proposed municipal corporation are not unreasonably large or small, and that it is right, just, and equitable that the prayer of the petition presented to the board be granted, the petition for such injunction shall be dismissed.

Thus, it would appear that the proceeding has some of the aspects of an error proceeding to the extent that if there has been error in the proceedings before the Board of County Commissioners an injunction will be granted. This follows inasmuch as the conjunctive was used above in applying these factors to a situation dismissing the petition, whereas in Revised Code section 709.13, setting forth when an injunction shall issue, the same factors are stated in the disjunctive. Thus, proof of any one of them would entitle plaintiff (if he can show the other requisites), to an injunction.

It has been stated that in making its determination as to whether the annexation is right, just, and equitable, "the Court must consider the subject broadly, having in view the highest interests of all concerned, and not only the present situation, but the needs and growth of the locality in the future."⁹² It has also been held that the ability of the municipal corporation to provide services to the area sought to be annexed, such as police and fire protection, is a political and administrative question and afford no basis for judicial relief,⁹³ as is the fact that there may be an increase in plaintiff's taxes.⁹⁴

If the court denies the injunction, the clerk shall present the transcript, map or plat, and petition to the legislative authority at its next regular session as if no petition for injunction had been presented to the court.⁹⁵ If the court grants the injunction no further proceedings shall be had in the matter but this shall not bar any future application for the annexation of the same territory.⁹⁶

⁹¹ McCord v. Cain, *supra*.

⁹² Watkins v. Cain, 154 N.E.2d 210 (Ohio C.P. 1956).

⁹³ McClintock v. Cain, 74 Ohio L. Abs. 554, 142 N.E.2d 296 (C.P. 1956).

⁹⁴ McClintock v. Cain, *supra*; Hall v. Siegrist, 13 Ohio Dec. 46 (C.P. 1902).

⁹⁵ Ohio Rev. Code § 709.08.

⁹⁶ Ohio Rev. Code § 709.09.

In an early case it was held that no appeal would lie from the judgment of the court allowing or denying an injunction.⁹⁷ After a statutory amendment, the supreme court held, however, that an appeal on questions of law from such judgment could be maintained.⁹⁸ In view of the wording of Revised Code section 709.08, it would appear debatable as to whether it was intended that the judgment of the court of common pleas should be reviewable. The question now appears fairly well settled that such judgment is subject to review.⁹⁹

The plaintiff once more must watch procedure, or he will find himself losing without the merits being heard. The mere filing of an appeal does not prevent the municipal corporation from proceeding to accept the annexation. If the plaintiff desires to prevent such action, he must seek a temporary restraining order during the pendency of the appeal pursuant to Revised Code section 2727.05, a stay of execution being insufficient.¹⁰⁰

If the plaintiff fails to obtain a temporary restraining order and the municipal corporation proceeds to accept the annexation, the appeal will be dismissed as presenting only a moot question to the court.¹⁰¹

There is no statute specifically providing for an appeal from a decision of the Board of County Commissioners disapproving the annexation. It would seem, however, that the 1957 enactment of Revised Code chapter 2506, which provides generally for an appeal from any decision of any board or commission of any political subdivision of the state, would now confer such right of appeal upon the petitioners if the board disapproves annexation.¹⁰²

⁹⁷ *Hulbert v. Mason*, 29 Ohio St. 562 (1876).

⁹⁸ *Geauga Improvement Ass'n v. Lozier*, 125 Ohio St. 565, 182 N.E. 489 (1932).

⁹⁹ *Lamneck v. Cain*, 73 Ohio L. Abs. 20, 136 N.E.2d 330 (Ct. App. 1955). It has further been held that the judgment may be reviewed upon an appeal upon questions of law and fact in view of the 1955 amendment of Ohio Rev. Code § 2503.02 to provide specifically that actions for injunction are appealable on questions of law and fact. *Baumhardt v. Mitchell*, 105 Ohio App. 491, 152 N.E.2d 905 (1958).

¹⁰⁰ *Franklin v. Croll*, 36 Ohio St. 316 (1880).

¹⁰¹ *Miner v. Witt*, 82 Ohio St. 237, 92 N.E. 21 (1910); *Lamneck v. Cain*, 73 Ohio L. Abs. 20, 136 N.E.2d 330 (Ct. App. 1955); *Naumovich v. Cain*, 76 Ohio L. Abs. 208, 146 N.E.2d 150 (Ct. App. 1956).

¹⁰² Ohio Rev. Code § 2506.01 provides: "Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code and as such procedure is modified by sections 2506.01 to 2506.04, inclusive, of the Revised Code. "The appeal provided in sections 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law. . . ."

ANNEXATION UPON THE APPLICATION OF THE MUNICIPAL CORPORATION

The procedures for annexation upon the application of the municipal corporation are similar to those upon application of freeholders. There are two marked differences: (1) the proceedings are commenced by petition of the municipal corporation seeking annexation filed with the board of County Commissioners¹⁰³ pursuant to an ordinance of the legislative authority directing such petition to be filed;¹⁰⁴ and (2) there must be an election at which all the electors of the unincorporated portion of the township involved (not just the area sought to be annexed), are given the opportunity to vote for or against the annexation.¹⁰⁵ This latter provision renders this procedure practically worthless as a method of annexation. Unless the municipal corporation desires to annex the entire township, it assumes an almost impossible burden in utilizing this procedure. This is true because the statute provides that if the election results in a vote against annexation not only are the instant proceedings concluded adversely to annexation but there may be no further proceedings for annexation for a period of five years following the unfavorable election.¹⁰⁶ This does not prevent the freeholder method from being utilized to annex the territory during such five year period.¹⁰⁷ Nevertheless, the procedure is unworkable since all the electors of the unincorporated portion of the township are entitled to vote at the election even though only a small portion of them might be involved in the annexation.

If, perchance, the election should result in a vote favorable to annexation, the Board of County Commissioners shall proceed within ninety days to complete annexation.¹⁰⁸ The same procedure shall apply, insofar as applicable, as apply to the freeholder method of annexation.¹⁰⁹ These provisions have been held to vest the same discretion in the Board of County Commissioners as under the freeholder method, and the Board cannot be compelled by mandamus to approve the annexation.¹¹⁰ There is one exception to the election requirement and that is if the only territory involved is owned by the county, only consent of the legislative authorities of the political "units" involved shall be necessary to effect annexation.¹¹¹

¹⁰³ Ohio Rev. Code § 709.15.

¹⁰⁴ Ohio Rev. Code § 709.14.

¹⁰⁵ Ohio Rev. Code § 709.17.

¹⁰⁶ *Ibid.*

¹⁰⁷ *McClintock v. Cain*, 74 Ohio L. Abs. 554, 142 N.E.2d 296 (C.P. 1956).

¹⁰⁸ Ohio Rev. Code § 709.17.

¹⁰⁹ Ohio Rev. Code § 709.16.

¹¹⁰ *State ex rel. Loofbourrow v. Bd. of County Comm'rs of Franklin County*, 167 Ohio St. 156, 146 N.E.2d 721 (1957).

¹¹¹ Ohio Rev. Code § 709.16.

ANNEXATION OF ONE MUNICIPAL CORPORATION TO ANOTHER

A rather cumbersome method is provided for the annexation of one municipal corporation to another, which really amounts to a merger of the two municipal corporations.

Such proceedings are commenced by a petition signed by twenty-five per cent of the resident electors who voted at the last regular municipal election filing a petition with the legislative authority of the municipal corporation indicating their desire to be annexed to an adjoining or contiguous municipal corporation.¹¹² The legislative authority must then pass an ordinance within thirty days declaring its intention to enter into negotiations with such adjoining municipal corporation for annexation thereto and appointing three commissioners to represent it at such negotiations.¹¹³ The other municipal corporation then appoints three commissioners to represent it¹¹⁴ and the six commissioners must then meet and work out the "conditions of annexation."¹¹⁵ If the commissioners do not agree upon the "conditions of annexation" within 120 days, the judge of the Probate Court shall appoint one additional commissioner and a vote of four of the seven shall be sufficient.¹¹⁶ There are no statutory restrictions upon or guides as to, what the "conditions of annexation" shall contain.

An election shall then be held at the next regular municipal election or primary election more than sixty days after the filing of the conditions with the legislative authorities.¹¹⁷ Such election shall be conducted in *both* municipal corporations, except that the legislative authority of the municipal corporation to which annexation is sought may consent to the annexation and waive the election unless twenty-five per cent of the electors by petition request such election.¹¹⁸ Notice of the election must be given "by poster or otherwise" for at least twenty days prior to the election and a copy of the "conditions of annexation" must be mailed to each voter of the municipal corporation.¹¹⁹

This procedure may work quite well for small communities, but obviously becomes very cumbersome, burdensome, and expensive when large communities are involved.

¹¹² Ohio Rev. Code § 709.24.

¹¹³ *Ibid.*

¹¹⁴ Ohio Rev. Code § 709.27.

¹¹⁵ Ohio Rev. Code § 709.28.

¹¹⁶ *Ibid.*

¹¹⁷ Ohio Rev. Code § 709.29.

¹¹⁸ Ohio Rev. Code § 709.30.

¹¹⁹ *Supra* note 117.

ANNEXATION OF A VILLAGE TO A CITY

The fourth annexation procedure is that for annexation of a village to an adjoining city. Revised Code section 709.35 provides as follows in this regard:

When a city and a village adjoin each other, and the inhabitants of territory constituting any part of such village desire to be annexed to such adjoining city, on application of the legislative authority of the city and on written request of a majority of the voters of the territory of such village sought to be annexed, or, on the written request of two thirds of the resident voters of any part of the territory of such village sought to be annexed, the board of county commissioners may cause such alteration to be made, and the boundaries of the city and the village, respectively, to be established in accordance with the application and request, and such territory thereafter shall constitute part of the city. In all such proceedings, the board shall be governed by sections 709.02 to 709.21, inclusive, of the Revised Code.

While on the face of the statute, it might appear that only a portion, but not all of a village may be annexed by this method, it becomes clear that all or part may be annexed pursuant to this section when reference is made to its statutory history. The section originally provided for annexation of only part of a village to a city.¹²⁰ It was subsequently amended to provide for annexation of "all or part" of a village to a city.¹²¹ In the revision of the code resulting in the Revised Code the words "all or" were omitted apparently on the basis that they were surplusage. In view, however, that Revised Code section 1.24 provides that the adoption of the Revised Code shall not effect a substantive change in the law, it has been held that all of a village may be annexed to an adjoining city following the procedures of Revised Code section 709.35, *supra*.¹²²

CONFLICT OF JURISDICTION

There sometimes arises a problem where the same territory is involved in several different proceedings for incorporation or annexation.¹²³ Under such circumstances it appears that the proceedings

¹²⁰ 88 Ohio Laws 39.

¹²¹ 111 Ohio Laws 405.

¹²² *Clay v. Vigor*, Court of Common Pleas of Franklin County, Case No. 193741 (August 6, 1958).

¹²³ It can be gleaned by reading the case of *State ex rel. Maxson v. Bd. of County Comm'rs of Franklin County*, 167 Ohio St. 458, 149 N.E.2d 918 (1958), that the same territory was involved at the same time in annexation proceedings to both Grandview Heights and Columbus. In addition, the same territory was included in the incorporation proceedings involved in the case of *Hoye v. Schaefer*, 166 Ohio St. 300, 141 N.E.2d 765 (1957) and the subsequent proceedings in that case, see *supra* notes 32 and 86. (The 910 acres mentioned in the *Maxson* case were finally annexed to Columbus late in 1959.)

first commenced take precedence and the subsequent proceedings must be abated pending the determination of the first.¹²⁴ This does not mean, however, that the action of the body having jurisdiction of the second or subsequent proceeding will be void if it considers the matter notwithstanding the prior proceedings. On the contrary, its action will be considered perfectly valid, if *at the time it is challenged in court* the prior proceeding has been disposed of by a disapproval of the annexation or incorporation by the body having jurisdiction¹²⁵ or by a permanent injunction enjoining further proceedings in such prior proceeding.¹²⁶

This situation results in "races" to the courthouse and confusion as to the status of territory. It is quite possible to have the same territory annexed to two municipal corporations or annexed to one and incorporated as another at the same time. Such status remains uncertain until all the resultant litigation is completed and even then the outcome may depend upon which proceeding comes up first for decision in the court. Such a situation is anything but desirable.

CONCLUSION

It is the hope of the author that this article has presented a basic picture of the present state of the annexation laws of Ohio. There has been no attempt to exhaust the subject of annexation. Rather, the goal has been to point out the problems that exist and the pressing need for legislative action. While annexation is possible under the existing law, the procedures are cumbersome and quite time consuming. On the other hand, all too often the law does not adequately protect the opponent of annexation even where he has a valid objection—it is easy to delay annexation but difficult to prevent it.

The only major change in the annexation laws in recent years has been in an area that on the surface only indirectly affects municipal corporations.

Prior to September, 1955, the territory automatically became a part of the school district of which the municipal corporation was a part upon annexation to the municipal corporation.¹²⁷ At that time

¹²⁴ *State ex rel. Ferris v. Shaver*, 163 Ohio St. 325, 126 N.E.2d 915 (1955); *Hoye v. Schaefer*, 166 Ohio St. 300, 141 N.E.2d 765 (1957). In the *Ferris* case, the court distinguished *Trumbull County Bd. of Educ. v. State ex rel. Van Wye*, 122 Ohio St. 247, 171 N.E. 241 (1930), which held that where two boards are given power to act on the same subject matter, the board first to act under such power acquires exclusive power to act, on the grounds that the application of this principle is dependent upon such acquisition being valid.

¹²⁵ *Hoye v. Schaefer*, *supra*.

¹²⁶ *State ex rel. Ferris v. Shaver*, *supra*.

¹²⁷ Ohio Rev. Code § 3311.06.

this was changed so that, if not all of the losing school district were annexed, the annexed territory will not be transferred to the school district of which the municipal corporation is a part unless the State Board of Education approves the transfer.¹²⁸ There is a serious question of the constitutionality of this provision as it would seem to be an unlawful delegation of legislative power. In any event, the amendment created a problem vital to any municipal corporation caught in the web of circumstances. The tax rate on property for all purposes (state, municipal, county, school, *etc.*), cannot exceed ten mills without a vote of the electors.¹²⁹

The portion of this ten mills to be levied by each political subdivision is fixed according to a formula provided by statute.¹³⁰ Unfortunately, the tax rates for school districts varies so that if an annexation involves an area in a school district with a tax rate higher than that of the school district of the annexing municipal corporation, the ten mill limitation will be exceeded unless the territory is also transferred to the school district of the annexing municipal corporation. This, however, by the terms of the statute requires the approval of the state board of education: If such approval is not forthcoming, the problem arises—who loses what taxes in order to avoid a violation of the ten mill limitation? It has been held that, under such circumstances, approval of the state board is not necessary but that the territory will automatically be transferred to the school district of the annexing municipal corporation in order to avoid the violation of the ten mill limitation.¹³¹ In 1959, the General Assembly enacted a statute to attempt to alleviate this situation by providing that the tax rate of the municipal corporation would be reduced *in the annexed area only* sufficiently to avoid the violation of the ten mill limitation.¹³² This may or may not have solved the problem inasmuch as there is a

¹²⁸ 126 Ohio Laws 302. In 1959, another amendment was made dealing with payment by the receiving school district for any school building located in the transferred territory, which amendment creates new problems of construction and otherwise, not the subject of this discussion. There are currently three cases pending in the Supreme Court of Ohio and one in the Court of Common Pleas of Franklin County involving interpretation of Ohio Rev. Code § 3311.06 in its various forms. In all cases, the Columbus City School District is defendant and the Worthington City, Whitehall City, Grandview City, and Jefferson Local school districts are respectively plaintiff. Determination of these cases may provide the answer to the questions raised.

¹²⁹ Ohio Const. art. XII, § 2.

¹³⁰ Ohio Rev. Code § 5705.18.

¹³¹ State *ex rel.* Bd. of Educ. v. Dunn, 165 N.E.2d 247 (Ohio C.P. 1958), *appeal dismissed*, 163 N.E.2d 694 (1959). To accent the serious impact of this problem, it will be noted that the tax loss in the case would have amounted to approximately one million dollars per year to the city and county involved.

¹³² Ohio Rev. Code § 5705.311 (Page Supp.).

question as to whether such system provides taxation by uniform rule within the municipal corporation.¹³³ In any event, this is another area which requires serious legislative study.

The need for legislative study with a resulting complete revampment of the annexation law of Ohio is manifest. No matter what the provisions may be it is vitally necessary that annexation procedures be completely divorced from incorporation procedures so that the annexation statutes are complete in themselves without reference to the incorporation statutes, even if the provisions be identical. This is true because there is no logical connection between annexation and incorporation. In annexation, we deal with an existing operating municipal corporation, a "going business" so to speak. In incorporation we are about to start out on a new venture the success of which is entirely unknown. An entirely different set of rules should be provided to cover the two situations.

The Supreme Court of Ohio has recognized the need for legislative study, stating:

It is unfortunate, indeed, that the statutory situation is such that the proponents of annexation and those of incorporation are required to engage in races to the courthouse; and the chaos and confusion which exist as a result of discrepancies in timing and the parallel jurisdiction of county commissioners and township trustees should undoubtedly be made the subject of careful legislative study.¹³⁴

Perhaps, in addition, there should be different procedures for annexation to a village and for annexation to a city. It is apparent that the problems of urban life are often not present when a village is involved and that many unincorporated areas surrounding a city have a larger population and more complete development than some villages.

The Courts have attempted to fill in the many voids left in the present annexation laws and to make a semblance of order out of the chaotic situation that exists. Unfortunately, as will be seen from the cases cited herein, there are far too few decisions from courts of appellate jurisdiction to afford any great degree of certainty to the interpretations that we have. This is not meant as a criticism of the courts but rather accents the need for legislative action.

The need is manifest, the problems that exist are paramount. It can only be hoped that the General Assembly, at its next session, will undertake a study of the matter and enact a resultant revision of the annexation laws so that annexation will be more simple, more sensible, more fair.

¹³³ *Supra* note 129; 1956 Op. Att'y Gen. Ohio 813, 818.

¹³⁴ *Hoye v. Schaefer*, 166 Ohio St. 300, 141 N.E.2d 765 (1957).